

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 No. 12-md-02409-WGY

4  
5 In Re: NEXIUM (ESOMEPRAZOLE)  
6 ANTITRUST LITIGATION

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12 For Jury Trial Before:  
13 Judge William G. Young

14 **EXCERPT:** Judge's Directed Verdict Ruling

15  
16 United States District Court  
17 District of Massachusetts (Boston)  
18 One Courthouse Way  
19 Boston, Massachusetts 02210  
20 Friday, November 21, 2014

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22 REPORTER: RICHARD H. ROMANOW, RPR  
23 Official Court Reporter  
24 United States District Court  
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## 1 P R O C E E D I N G S

2 (**EXCERPT** begins.)

3 (Begins, 8:50 a.m.)

4 THE COURT: The Clerk will pass out to you the  
5 tentative revised jury verdict slip. It's exactly what  
6 I explained to Mr. Schoen yesterday. We've got a juror  
7 stuck on a bus, so we have a few minutes, and I want to  
8 use that time as productively as I can.

9 I am prepared to rule in part on the motions for  
10 directed verdict. They do not -- the rulings I am  
11 prepared to make don't lead us to an ultimate  
12 conclusion, but I can make the rulings, and I need to  
13 pose a question and it is to me a fairly crucial  
14 question.

15 So the various motions for a directed verdict are  
16 allowed in part and denied in part. They are allowed as  
17 follows.

18 There is no sufficient evidence here that Ranbaxy  
19 and Teva conspired together, that they acted otherwise  
20 than in their own individual best interest. Now, that  
21 doesn't answer the question of whether the agreements  
22 they separately entered into with AstraZeneca are  
23 anticompetitive, but I don't want to hear the word  
24 "conspiracy" as we go along here and we won't hear it in  
25 closing.

1           Second, there is no adequate evidence that any of  
2       these patents would be adjudicated invalid. There is no  
3       such evidence. Now, that may be fatal to the  
4       plaintiffs' case. Let me explain.

5           The motion is denied in the following respects.  
6       And I can best explain myself with reference to the jury  
7       verdict slip.

8           There is adequate evidence, if you jury believes  
9       it, about AstraZeneca's SSIs of market power. Professor  
10      Rosenthal gets them to the jury on that. On the  
11      totality of the evidence there is adequate evidence to  
12      answer affirmatively Questions 2 and 3.

13          I have grave doubts -- I choose my words with  
14      caution, that it's possible on this evidence  
15      affirmatively to answer Questions 4 and 5, but for a  
16      variety of prudential reasons, if this case goes forward  
17      as to AstraZeneca and Ranbaxy, I intend to keep Teva  
18      here through the verdict and we'll see where we are  
19      then.

20          So much for rulings. What I'm going to say now is  
21      not in any way a ruling and no one should take it as a  
22      ruling or anticipating a ruling. I have a question,  
23      it's a question for the plaintiffs, and it will -- and I  
24      will give the defense a chance to respond to it, and  
25      I'll explain how we'll address it. And here's the

1 question. And it's on the issue of causation.

2 If I give all intendments to Ms. Blume, not  
3 engaging in the least in any credibility assessment,  
4 what we have here is a putatively valid patent monopoly,  
5 which AstraZeneca owns. It's a patent monopoly, it's  
6 a -- which gives AstraZeneca a remarkably profitable  
7 income stream, billions of dollars.

8 Because it is such a lucrative market, one can  
9 expect that others would attack it, as they are  
10 privileged to do under our system -- and it's very  
11 important, and in fact they do attack it. Now, I'm not  
12 talking business terms, not the validity of the patent.  
13 So we've got Paragraph 4 litigation here. And as their  
14 own witnesses have said, AstraZeneca's own witnesses,  
15 these are "business decisions." And so in order to  
16 defend that income stream that is worth billions, they  
17 make an investment of millions of dollars defending it.

18 And, as the plaintiffs have argued, what is  
19 important here is -- or what is important in terms of  
20 evidence, as I see it, is not the ultimate validity of  
21 the patents, I've ruled on that, but that doesn't answer  
22 the question what people thought -- the business people  
23 thought about the validity of the patents. But it  
24 certainly is a good investment to invest millions of  
25 dollars -- 15 million is what I recall, but millions of

1 dollars to preserve your billions of dollars income  
2 stream.

3 Now, if we give everything to Ms. Blume, Teva is  
4 ready by sometime, she says 2009, and able -- and I  
5 think the totality of the evidence could support this,  
6 but I express no opinion, to launch. Ranbaxy, holding,  
7 as everyone has argued, the "keys to the kingdom," but  
8 it is unable to launch, the Court has so ruled, and  
9 everything in this case affirms that, has a business  
10 inclination to partner with Teva and though they have  
11 attacked the -- the defense has attacked that, those  
12 arguments go to the weight.

13 So if that's all there was, um, I'm thinking to  
14 myself, "All right, it's thin, but that gets to the  
15 jury." But then I come up against this. In a but-for  
16 world there would not be these supposed anticompetitive  
17 contracts. They would be gone. But that doesn't mean  
18 the patents would vanish.

19 And now to my question. I'll try to frame it.  
20 And I don't want an answer now, because I'm hopeful the  
21 juror will be here and because everything turns on -- to  
22 me everything turns on this, unless I get an adequate  
23 answer to this question, the case is over.

24 So the patents are putatively valid. The  
25 plaintiffs keep talking about "pushing it out" to May

1 2014. There's no "pushing out," the medicine patents  
2 are valid till May 27th, 2014. Though maybe AstraZeneca  
3 had questions about its own patents and the like.  
4 Maybe. But what is the incentive -- what is the  
5 incentive to AstraZeneca -- well, let me state it  
6 another way because to me it's the crucial question.

7 If this contract with Ranbaxy violates the  
8 antitrust laws, and maybe it does, what sort of  
9 settlement wouldn't have violated them? It cannot be  
10 that it's any settlement that provides some value to  
11 Ranbaxy beyond the, um, \$15 million that you invest for  
12 attorneys fees to protect your putatively valid market,  
13 though that does tie into AstraZeneca. At this point  
14 the **Actavis** opinion seems at war with itself. There's  
15 got to be some settlement that would be okay.

16 And I realize how inadequate my initial charge was  
17 to the jury. I was explaining how patent cases are  
18 usually settled. That won't work in this case because  
19 there is no incentive on AstraZeneca ever to give a  
20 start date -- I mean most patent cases are settled with  
21 a reasonable royalty license, that's what I told the  
22 jury, that's been my whole professional experience. But  
23 of course that doesn't work in this type of litigation,  
24 because of this waterfall effect, if you give a license,  
25 your income stream drops markedly. Just talking

1 economics, it drops by about 90 percent, if not more.  
2 No rational player would ever do that.

3 So, um, I -- since they never would do that, all  
4 this talk about what Ranbaxy and Teva would have done,  
5 as I think about it, it ends up with a "So what? Are  
6 they going to launch at risk?" We have a pretty good  
7 analog for that. If they launch at risk, as they did in  
8 Prilosec, AstraZeneca runs in, gets a preliminary  
9 injunction, as is permitted by the law, and there's  
10 no -- there's no antitrust harm because they have a  
11 putatively valid patent monopoly which the courts are  
12 going to uphold.

13 So if there's no evidence, and there is none, that  
14 the patents would ultimately be adjudicated invalid, um,  
15 I don't see how you get around that question.

16 Now, here's how we're going to deal with it. At  
17 2:00, because you ought to think about this, plaintiffs  
18 will get 10 minutes orally to argue that. I haven't  
19 read all these briefs just filed with the care I should.  
20 I'm doing the best I can. Maybe it's in there. And the  
21 defense will get 10 minutes to rebut. Two things can  
22 then happen. Either I grant a directed verdict and it's  
23 all over or I give you the weekend to brief the matter  
24 more fully.

25 Now, that's what I have to say about directed



1 verdict.

2 This business about, um -- and I see it in the  
3 witnesses. The plaintiffs' motions, and I take them,  
4 they frame them as "objections," but as to Larsson,  
5 MacMillan, Luk, they're all allowed, in part. We're not  
6 starting here with patent experts or patent fact  
7 witnesses. So it's an order of proof. I'm not saying  
8 they may not testify, but they may not testify yet,  
9 until I have what I consider primary evidence from the  
10 people who are making the decisions that in fact they  
11 relied upon this patent data to act in the marketplace  
12 the way they did. I think it's Larsson, MacMillan and  
13 Luk who are the patent folks.

14 Who's Pastore?

15 MS. WALKER: Your Honor, she's Teva's regulatory  
16 witness.

17 THE COURT: Fine. And Lungkilde, who is he?

18 MR. GAFFNEY: Your Honor, he is a scientist, a  
19 former AstraZeneca scientist who can speak to the  
20 benefits of the trihydrate form or the dihydrate form.

21 THE COURT: Yeah, not today. You've got to get me  
22 what Mr. Schmidtlein was promising. If the case is  
23 alive, I've got to know why people were doing things.  
24 Otherwise all of this -- my analysis need go no further  
25 than 403. You're launching off into something that

1 given the Court's -- and I don't fault you, but given  
2 the Court's ruling that there is no evidence that these  
3 patents would have been adjudicated invalid, I don't  
4 think is germane. That may be fatal to them. If it's  
5 not fatal to them, I've got to have all the business  
6 dealings first. Once I have the business dealings and  
7 fine out what they were relying on -- and we'll see what  
8 the strength of the cross-examination is -- if there's  
9 any suggestion, "Oh, come on, you weren't really relying  
10 on that, that's a fraud," then you may well back it up  
11 with these fact witnesses, these perfectly fine fact  
12 witnesses who actually were doing the patent stuff, um,  
13 fine, if that's an issue.

14 MR. GAFFNEY: Your Honor, may I be heard on one  
15 point?

16 THE COURT: Well, you may be -- (To the Clerk.)  
17 Oh, she's not here. You may be.

18 MR. GAFFNEY: Among the witnesses you've just  
19 mentioned, there's one, Dr. MacMillan who testifies to  
20 Item 3 on the verdict form, which is whether there were  
21 procompetitive --

22 THE COURT: Who is he?

23 MR. GAFFNEY: Dr. MacMillan is the Chairman of the  
24 Chemistry Department at Princeton, he is retained, a  
25 disclosed expert, he has served a report, he is here

1       this morning to testify.

2               THE COURT:   Oh, I -- then maybe I misspoke as to  
3       him.

4               MR. GAFFNEY:   He's not an inventor.

5               THE COURT:   Okay.   He may not be an inventor --  
6       and he's going to testify as to procompetitive effects?

7               MR. GAFFNEY:   Yes, your Honor, the license granted  
8       Teva and Ranbaxy the right to use the AstraZeneca  
9       process.   Now, his testimony --

10              THE COURT:   What license?

11              MR. GAFFNEY:   The license in the settlement.

12              THE COURT:   Yeah, right.

13              MR. GAFFNEY:   A component of the settlement  
14       agreement licensed the generics to use the AstraZeneca  
15       process.

16              THE COURT:   After May 27th, 2014?

17              MR. GAFFNEY:   Correct.   And he will testify that  
18       there was not a commercially-viable noninfringing  
19       alternative available.   So that license had considerable  
20       rights to anyone who got rights to it, that patent.   So  
21       that's what he's going to testify to.

22              THE COURT:   I see.

23              Why shouldn't I allow that?   That makes sense to  
24       me.

25              MR. SOBOL:   Well, it makes less sense to us, your

1 Honor, because there's nothing in Dr. MacMillan's report  
2 regarding a license or a value. He's a patent expert on  
3 the '789.

4 THE COURT: Well, I can handle that just like I've  
5 handled the others. We'll go question by question. But  
6 they can call him and he's an opinion witness and it  
7 better be in the report, and if it isn't, I'll deal it.

8 I'm not asking for a response because this is --  
9 the question I pose is, to the Court, very high stakes.  
10 Think of what you're going to say before you say it.  
11 We'll do it at 2:00.

12 Mr. Schoen?

13 MR. SCHOEN: I just want to raise two quick  
14 points, your Honor, if the juror's not here yet.

15 THE COURT: So I'm stuck here with you rather than  
16 get a jury in the box.

17 (Laughter.)

18 MR. SCHOEN: I promise I'll be brief.

19 THE COURT: No, that's quite all right.

20 MR. SCHOEN: Just two issues. One is if your  
21 Honor's inclined to keep Teva in the case, I do think  
22 we've reached a point whether there needs to be an  
23 instruction on Dr. McCool's testimony at some point to  
24 the jury, um, so that that testimony is going to allow  
25 to --

1 THE COURT: Didn't I give an instruction to the  
2 jury when I ruled?

3 MR. SCHOEN: No, you decided not to. You decided  
4 to wait because you were tabling -- you said "Until I  
5 decide the directed verdict motion, I don't want to  
6 instruct them because" --

7 THE COURT: Oh, quite right. I think I should and  
8 we should -- well, that's a good point.

9 (Laughter.)

10 MR. SCHOEN: Once in a while I get one.

11 THE COURT: No, no, no, don't take that as --  
12 don't take the negative pregnant.

13 (laughter.)

14 THE COURT: But I think I should do it.

15 MR. SCHOEN: The other issue, your Honor, is with  
16 respect to Question 6 on the verdict form, in light of  
17 the ruling on conspiracy, which of course we agree with,  
18 we do think, um, that there should be a separate  
19 causation question under the two agreements, because if  
20 there's no conspiracy, the question of whether just  
21 linking the two agreements like that together could lead  
22 to a situation where all the harm was say from the  
23 Ranbaxy agreement, Teva should not be in a position to  
24 be potentially liable for harm that was from the Ranbaxy  
25 agreement, there needs to be some separation on the

1 verdict form.

2 THE COURT: I thought about that and I thought  
3 that -- the way I see the case -- and this is not my  
4 business, but I'm trying to be transparent.

5 If you go down, if Teva goes down, if they say  
6 "yes" to Questions 1, 4, and 5, then it appears that  
7 there's some additional harm from Teva's agreement with  
8 AstraZeneca. I find it hard to see what that is.

9 MR. SCHOEN: (Laughs.)

10 THE COURT: Well, fine. But you're in through the  
11 verdict on that. But as I assess things, if you're  
12 going to win the case, you're going to win on questions  
13 4 and 5, and if you don't, that's your strongest  
14 argument -- I'm so old I still call it "Judgment NOV."  
15 All right? I'm not telegraphing anything because then  
16 I'll have the moral force of a jury verdict and you know  
17 how strongly I feel about that.

18 But I haven't forgotten the good points you made  
19 yesterday. That's why I used, and I've used it before,  
20 "grave doubts." You can go back if there was a word  
21 search of everything I've said, you can see what happens  
22 after I say "I have grave doubts" about something.  
23 "I've got grave doubts." But you're in the case. And  
24 so if you're in the case, that would mean there was some  
25 additional harm.

1           The first though, because I think I should do  
2           that, we've kept them waiting, maybe the -- because I'm  
3           not letting Larsson get back on the stand, so I explain  
4           that we're shortening things down, that we're at that  
5           stage now, and then I explain as to Dr. McCool, um, his  
6           testimony, the numbers from his testimony, that's out,  
7           and let it go at that.

8           MR. SCHOEN: So that -- just so you're going to  
9           say that the specific opinions he testified to --

10          THE COURT: As to figures, what the -- and I'll  
11          give us an example, "What he had to say about whether  
12          there were comparables, that's in, it's up to you  
13          whether you believe it." And we start that way. And  
14          then I guess --

15          Where do you want to start? I'm not trying to  
16          embarrass -- looking to the defense, your presentation,  
17          but I am requiring that I get some evidence that I think  
18          passes 403.

19          Do you want to start with MacMillan?

20          MR. GAFFNEY: Yes, your Honor.

21          THE COURT: Well, then I'll let you. And then  
22          we'll go to -- well, then we'll go -- who? To Pastore,  
23          the regulatory person, and the like.

24          All right. I'll recess then. As soon as we have  
25          the jury, we'll start. We'll recess.

1 (Recess, 9:20 a.m.)

2 (**EXCERPT** ends.)

3  
4 C E R T I F I C A T E

5  
6 I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,  
7 do hereby certify that the foregoing record is a true  
8 and accurate transcription of my stenographic notes  
9 before Judge William G. Young, of the aforementioned  
10 **EXCERPT**, on Friday, November 21, 2014, to the best of my  
11 skill and ability.  
12  
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15 /s/ Richard H. Romanow 11-21-14

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RICHARD H. ROMANOW Date  
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